IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-282

DONALD E. CURRY, ET AL.,
Petitioners,

versus

DALLAS N.A.A.C.P., ET AL., and
NOLAN ESTES, ET AL.,
Respondents.

No. 78-253

NOLAN ESTES, ET AL.,
Petitioners,

versus

DALLAS N.A.A.C.P., ET AL.,
Respondents.

No. 78-283

RALPH F. BRINEGAR, ET AL.,
Petitioners,

versus

DALLAS N.A.A.C.P., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS, DONALD E. CURRY, ET AL

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TO THE HONORABLE COURT:

OPINION BELOW

The opinion of the Court of Appeals (Appendix C Petition for Writ of Certiorari of Nolan Estes, et al, 130a-146a) is reported at 572 F.2d 1010.

JURISDICTION

Judgment of the Court of Appeals was entered on April 21, 1978. A timely petition for rehearing en banc filed by these Petitioners was denied on May 22, 1978. The Petition for Certiorari was filed August 19, 1978 and was granted February 20, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In the absence of evidence or a finding that racial imbalance resulted from intentional segregative action on the part of the Dallas Independent School District, do the District Court and Court of Appeals have the power to order student reassignment?

2. Can there be a vestige of a State-imposed dual school system in the Dallas Independent School District when no child presently attending schools in that district has ever been assigned to a school except under a plan mandated by the United States Courts?

3. Does the Constitution require the imposition of a remedy which the overwhelming evidence demonstrates not only fails to remedy the problem at which it is directed, but exacerbates the problem?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions involve the equal protection clause of the Fourteenth

Amendment to the Constitution of the United States and the actions of Congress with respect to the subject of education, student assignment, and equal protection. Such provisions read in pertinent parts as follows:

14th Amendment, U.S. Constitution:
Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. §1701 (Equal Educational Opportunity Act):
the failure of an educational agency to attain a balance on the basis of race, color, sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of the laws.

20 U.S.C. §1712:
In formulating a remedy for denial of equal educational opportunity or denial of equal protection of the laws, a court, department or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of laws.

20 U.S.C. §1705:
The assignment by an educational agency of a student to a school nearest his place of residence which provides appropriate grade level and type of education for such student is

not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex or national origin or the school to which such student is assigned is located on its site for the purpose of segregating students on such basis.

SUMMARY OF ARGUMENT

Petitioners Curry et al urge that the Fifth Circuit and District Court decisions below be reversed and rendered and this case terminated by dismissal of the complaints for the following reasons:

1. In 1965 a racially neutral neighborhood assignment plan was adopted and mandated by the Fifth Circuit Court of Appeals in *Britton v. Folsom*, 350 F.2d 1022 (5th Cir. 1965). This decision was unappealed and unchallenged for five years until this present suit was commenced to remedy imbalance in the Dallas schools not caused by an intentional segregative action of the Dallas Independent School District and in part arising after 1965 as a result of the Court of Appeals order. Having adopted a racially neutral plan, the Courts cannot revise its effects because of racial imbalance. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 49 L.Ed.2d 599 (1976).

2. In the absence of a showing of a constitutional violation, which has been held by the District Court *not*

to have occurred, no remedy can be ordered. The District Court in 1971 held that racial imbalance came about as a result of private housing patterns and not as a result of actions by the school district. With such a finding the case must be reversed and rendered dismissing the complaint. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 53 L.Ed.2d 851 (1977).

3. Even if a post 1965 constitutional segregative action by the Dallas Independent School District is found (and Petitioners Curry et al know of none) it did not have an effect on the racial imbalance in the District, and a remedy of student reassignment or busing does not address the violation. *Dayton Board of Education v. Brinkman, supra.*

4. As a tool the remedy of "busing" or student reassignment is ineffective to desegregate and has destroyed any chance for a stable integrated school system. The Constitution does not require the elimination of neighborhood schools if drawn on racially neutral lines, simply because voluntary housing patterns create racial imbalance, especially where voluntary majority to minority transfer policies permit children to attend any school in which their race is a minority if transferring from a school in which the student's race is in the majority.

STATEMENT

Since 1965 the assignment of every student in the Dallas Independent School District ("DISD") has been

mandated by the United States Courts.[1] In 1965 the Court of Appeals for the Fifth Circuit in *Britton v. Folsom*, 350 F.2d 1022 (5th Cir. 1965) ordered the immediate assignment of students to neighborhood schools without regard to race. That order was not appealed. The DISD complied with that order, and student assignment within the DISD has continuously since that date been pursuant to whatever the District Court or the Court of Appeals for the Fifth Circuit ordered. *Tasby v. Estes*, 444 F.2d 124 (5th Cir. 1971). As a result, no child presently in the twelve grades in the DISD has ever attended a school except by an assignment mandated by the United States Courts.

The present case, a new one, was filed in 1970 by Plaintiffs Tasby, et al; such plaintiffs complained of racial imbalance (in part caused by the 1965 order of the Fifth Circuit) and asked for "meaningful desegregation" of the DISD in accordance with *post-1965* decisional law. The complaint pointed principally to racial imbalances in DISD schools, as its basis for requesting "meaningful desegregation." 517 F.2d 92 at 96. On July 16, 1971, based on its interpretation of *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 28 L.Ed.2d 554. (1971) *("Swann")*, the District Court ordered a student assignment plan upon a finding that

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1 The opinions which constitute "the present controversy" are as follows: (1) *Britton v. Folsum*, 350 F.2d 1022 (5th Cir. 1965). (2) *Tasby v. Estes*, 342 F.Supp. 945 (N.D.Tex. 1971) (sometimes called *"Tasby-1971"*), *reversed*, *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975)) (sometimes called *"Tasby-1971"*). (3) *Tasby v. Estes*, 412 F.Supp. 1192 (N.D.Tex. 1976) (sometimes called *"Tasby-1976"*), *reversed*, *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978 (sometimes called *"Tasby-1978"*).

> When it appears as it clearly does from the evidence in this case that in the Dallas Independent School District 70 schools are 90% or more white (Anglo), 40 schools are 90% or more black, and 49 schools with 90% or more minority, 91% of black students in 90% or more of the minority schools, 3% of the black students attend schools in which the majority is white or Anglo, it would be less than honest for me to say or to hold that *all vestiges* of the dual system have been eliminated in the Dallas Independent School District, and I find and hold that elements of the dual system still remain. 342 F.Supp. at 947. [Emphasis added.]

The District Court's 1971 student reassignment plans were based solely upon the finding of a racial imbalance among the DISD schools as set forth above. The only "fault" which the District Court found with the DISD was that it did not on its own make changes to accommodate *post-1965* law changes regarding faculty and staff assignments, voluntary majority to minority transfers and transportation, and school construction and site selection. 342 F.Supp. at 947-48. The DISD voluntarily agreed to the desegregation of faculty, the majority to minority transfer policy, transportation of such students electing majority to minority transfer, and the appointment of tri-racial committees at the beginning of the 1971 trial. *There is no finding of any other discriminatory action by the Dallas Independent School District anywhere in the record before this Court.*

With respect to the racial imbalance among the schools the District Court found that there were only "vestiges" of a dual school system — *not* that the DISD *was* a dual school system. 342 F.Supp. at 947. (See also the same observation in the 1976 District Court opinion at 412 F.Supp. at 1196). The court found that such "vestiges" or racial imbalances did not result from any acts of the DISD. Instead, it found:

> The adoption of a plan of desegregation for a school system of the size and complexity of DISD has been commented upon briefly. *The problems result, of course, from private housing patterns that have come into existence and not from any action of the DISD.* The complex school districts bear little resemblance to the factual situation of *Green* or even the fact situation of *Swann* which served 84,000 pupils in 107 schools. 342 F.Supp. at 951. [Emphasis added.]

In its "Supplemental Opinion" on August 17, 1971, the District Court, with respect to the area of Oak Cliff presently complained of by the Dallas N.A.A.C.P., also found:

> The education through a wide-course selection being available as chosen by the student should not be made to suffer for the purpose of arbitrary racial mixing *to alleviate a condition which, in this particular section of the school district, results primarily from private housing patterns coming*

into existence since 1965 and not from any action of the DISD. 342 F.Supp. at 956. [Emphasis added.]

Not only did the District Court have no specific findings of intentional segregative intent in connection with any existing student school assignment, or "vestiges," the District Court in its August 2, 1971, order found and held "the Board of Education of DISD [to be] in good faith and committed to the principle of equal quality education." 342 F.Supp. at 950.

Four years later, on appeal, the Fifth Circuit woodenly interpreted the Supreme Court's decisions to make "it clear that nothing less than the elimination of predominantly one-race schools is constitutionally required in the disestablishment of a dual school system based upon segregation of the races." 517 F.2d 92 at 103. On that basis, the Fifth Circuit remanded and directed the district court "to formulate . . . elementary and secondary student assignment plans which comport with the directives of the Supreme Court and of this opinion," without direction as to what that means. 517 F.2d at 110.

In early 1976, the District Court conducted the extensive evidentiary hearings that form the record in this proceeding. The District Court, pursuant to the instructions of the Fifth Circuit, construed its task to be the elimination "from the public schools [of] all vestiges of state-imposed segregation." 412 F.Supp. at 1193, 1195. After allowing the NAACP to intervene at that

stage, the Court proceeded to hear evidence from the DISD, the plaintiffs, Petitioners Curry, et al, Petitioners Brinegar, et al, the NAACP, and others. Based on what it had already heard in 1971 and the later evidence, the District Court again did *not* make any finding of a constitutional violation, or of a denial of any student's right to equal protection, or of the extent in the DISD of the effects of any such violation, or of the amount of remedy that would cure such effects insofar as found. Instead, the court made the following findings, which Petitioners Curry, et al submit are critical to this court:

> The most significant feature of the DISD now as opposed to 1971 is that the DISD is no longer a predominantly Anglo student school system. In the years which have intervened since this Court's 1971 order, the percentage of Anglos in the DISD has declined from 69% to 41.1%, and projections show no reversal of this trend to a predominantly minority district. 412 F.Supp. at 1197.
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> * * *
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> Although the DISD in 1975-76 cannot be considered to be wholly free of the vestiges of a dual system, significant strides in desegregation have been made since the Court's 1971 order as a result of natural changes in residential patterns in the past three years. In the 1970-71 school year, 91.7% of all black

students in the DISD attended predominantly minority schools, whereas in the 1975-76 school year, the percentage has dropped to 67.6%. Testimony during the hearings showed that large areas of Dallas which formerly reflected segregated housing patterns are now integrated, namely Western Oak Cliff, Pleasant Grove, East Dallas, the area of North Dallas included in the attendance zone for Thomas Jefferson High School.

Testimony also established that the DISD has undertaken in good faith and on its own to equalize the educational opportunity for all children during recent years. 412 F. Supp. at 1197.

* * *

In spite of the DISD's efforts, Dr. Chase's[2] study concluded that there is still a gap between intent to provide equal educational opportunity and the achievement of this goal. But the study also concluded that the DISD is accepting the continuing challenge to speed progress and close this gap.

2 An educational expert hired by the DISD to give an independent and impartial assessment of its plans and programs. 412 F.Supp. 1197.

> The Dallas Independent School District in recent years, has acknowledged frankly the existence of persisting inequalities and inadequacies in its provisions for education. Instead of regarding these conditions as inevitable, the District has moved progressively to treat them as challenges with which it must cope swiftly and effectively. All school systems, and especially those in our larger cities, are faced with the urgent necessity of alleviating the learning disabilities which have their roots in poverty, prejudice, and other forms of discrimination. No other school district offers a better prospect for significant progress in this direction. [quoting from Dr. Chase's study]

The study thoroughly evaluated the DISD's programs, pin-pointing areas which needed improvement and making recommendations to that end. Dr. Chase testified that this study was unique in the amount of response it elicited from the School Board and the Administration; he testified that there is not one item cited that the Board and Administration have not responded to in some way. His testimony was that there can never be a perfect school system, but that at least the DISD is conscientiously on the road to providing equal educational opportunity for all. 412 F.Supp. at 1198.

* * *

[With regard to a feature of the plan adopted that left the area of South Oak Cliff almost entirely black in school attendance:]

> . . . The court is of the opinion that, given the practicalities of time and distance, and the fact that the DISD is minority Anglo, this subdistrict must necessarily remain predominantly minority or black. However, this does not mean that the goal of equal educational opportunity for all cannot be achieved. In terms of facilities, Dr. Hall[3] testified that with the exception of Budd and Harllee Elementary Schools and the site at Roosevelt High School, the facilities in this area can be categorized as superior. Additionally, Dr. Hall testified that the environment in which each center is located, i.e., the property immediately adjacent to the schools, as well as the residential area served by them, can be classified as superior. Dr. Hall testified that educational opportunities in terms of facilities or programs would not be improved by complete redistribution of all pupils, and in some situations, they would be lessened. 412 F.Supp. 1204.
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> * * *

3 Dr. Josiah Hall, an expert hired and appointed by the District Court to evaluate the DISD and to develop a plan of his own. 412 F. Supp. 1194.

[With regard to a feature of the plan that left grades 9-12 on a neighborhood basis but which called for magnet schools:]

> . . . The Court is convinced that the magnet school concept on the 9-12 grade level will be more effective than the assignment of students to achieve a certain percentage of each race in each high school. The Court tried this method of student assignment in 1971, and it has not proven wholly successful in achieving the goal of eliminating the vestiges of a dual system in these grades. The evidence shows that of approximately 1,000 Anglos ordered to be transported to formerly all-black high schools under this Court's 1971 student assignment plan, fewer than 50 Anglo students attend those schools today. Whatever the cause might be for the non-attendance of Anglos in those schools today, this Court finds that it can in no way be attributed to official actions on the part of school authorities. 412 F.Supp. 1205.
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> It should also be noted that changes in demographic patterns have resulted in the drastic reduction of predominantly Anglo high schools in the DISD. 412 F.Supp. 1205.
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> * * *
>
> The most realistic, feasible, and effective method for eliminating the remaining

vestiges of a dual system on the 9-12 level, and for providing equal educational opportunity without regard to race, is the institution of magnet schools throughout the DISD. 412 F.Supp. 1205.

* * *

The DISD has acted in good faith since this Court's order in 1971 and has made reasonable efforts to fulfill the obligations imposed by that order. The DISD has further taken good faith steps to eradicate inequality in educational opportunity which has previously existed in the DISD. Had the DISD not shown a willingness to improve the quality of education for all its students, and especially those in the minority areas which previously had been neglected, this Court might feel impelled to adopt a different remedy. 412 F.Supp. at 1207.

In spite of these findings, in response to the mandate of the Circuit Court, the District Court adopted a plan that provided for the busing of approximately 17,300 students in grades 4-8, a majority to minority transfer plan, magnet schools, a rigid plan for the ethnic make-up of the top echelon of DISD staff (44% white — 44% black — 12% Mexican-American), numerous "accountability" concepts, and other non-busing provisions. 412 F.Supp. 1192. The District Court felt the plan was necessary to remove all "vestiges" — as it had been ordered to do by the Fifth Circuit.

Following in its former footsteps, the Fifth Circuit again woodenly rejected the District Court's student assignment plan, not because, as Petitioners Curry et al urged, it was constitutionally improper and outside the power of the court under recent decisions of the Supreme Court, but solely because of the existence of one race schools and the claim that there were not "adequate time-and-distance studies in the record in this case." 572 F.2d at 1014. The Fifth Circuit, ignoring all the specific trial findings quoted above, stated it "cannot properly review any student assignment plan that leaves many schools in a system one race *without specific findings by the district court as to the feasibility of these techniques.*" *Ibid.* In its mandate, the Fifth Circuit in effect acknowledged that it really was only giving lip-service to any district court findings; because it remanded for "the formulation of a *new* student assignment plan *and* for findings to justify the maintenance of any one-race schools that *may be* a part of *that* plan." (Emphasis added.) 572 F.2d at 1018. The Fifth Circuit challenged none of the above findings as being clearly erroneous.

ARGUMENT

The real question before this Court is whether there should have been any order for a student assignment plan *other* than the one that was approved by the Fifth Circuit in 1965 in *Britton v. Folsom*, 350 F.2d 1022 (1965) from which no appeal was taken. There may be skirmishes about other portions of what the District Court has now ordered, but the fundamental, and wide-

reaching decision this Court must make is whether federal court student assignment orders, made solely on the basis of, and solely to cure, ever-changing racial imbalances in various schools in a metropolitan school district, are constitutionally permissible, much less effective, as equitable remedies. Petitioners Curry, et al submit that now, 8 years after *Swann* during which Courts of Appeal have steadily but perfunctorily demanded the removal of "all vestiges" of student imbalance in city school systems by widespread busing, the answer is "no." This is so in the Dallas case because the findings by the District Court do not support any such remedy, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 49 L.Ed.2d 599 (1976) *("Pasadena")*; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 53 L.Ed.2d 851 (1977) *("Dayton")*, and because mandatory student assignment in metropolitan school districts to achieve racial balances, or remove "vestiges", is impractical and ineffective as an equitable remedy and destructive of the very objective it was designed to accomplish: meaningful integration of metropolitan school districts.

I. The District Court Had No Power To Order Further Student Assignment Plan To Cure Racial Imbalances

This present case was a new lawsuit filed on October 6, 1970, by Tasby et al as plaintiffs. As the Fifth Circuit described it, the complaint requested "desegregation of the DISD in accordance with post-1965 decisional law."

517 F.2d at 96. The DISD was, as noted, already operating under a racially-neutral neighborhood student assignment plan ordered by the Fifth Circuit in 1965. After the 1971 trial, the District Court found that "all vestiges" of a dual school system had not been "eliminated," but based that holding solely on racial imbalances in various public schools that the Court itself found did not result from any acts of the DISD. (See pp. 5-6 *supra*.) The Fifth Circuit, after curiously holding the case four years, struck down an innovative television plan adopted by the District Court, because the Circuit bench misinterpreted *Swann* to require "the *elimination* of predominantly one-race schools." 517 F.2d at 103. Even though the DISD *had never used buses* to transport any person except physically handicapped students, and even though there was no proof of any new constitutional violation — or the extent of it — the Fifth Circuit ordered development of a new student assignment plan (without guidance as to how or what) in 1975.

Following the District Court trial and findings recited above, the Fifth Circuit again — and in the face of *Pasadena* and this Court's instruction in *Austin II*, *Austin Independent School District v. United States*, 429 U.S. 990, 50 L.Ed.2d 603 (1976) — demanded a new assignment plan, citing its rhetoric about the constitutional requirement that one-race schools be eliminated and noting as an apparent reason for the reversal the insufficiency of evidence of any time-and-distance studies (as if *that* were a constitutional determinant).

A racially-neutral plan for assignment having been adopted in 1965 and not having been appealed, the District Court, in the absence of a finding of a new constitutional violation, had no authority to correct racial imbalances in the DISD schools by ordering busing. *Pasadena, supra.* As the Court said in *Pasadena:*

> . . . there are limits beyond which a court may not go in seeking to dismantle a dual school system. These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation for 'absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.' (49 L.Ed.2d at 607.)

Indeed the Court recognized in *Swann* that once a neutral plan had been approved, a district court had no basis for further intervention, by holding:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. . . . [In] the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.' 402 U.S., at 31-32, 28 L.Ed.2d at 575-576.

For this reason alone, there is no basis for a *new* student assignment plan to be ordered by a federal district court. See the Dissenting Opinion in *Hutch v. United States,* ____U.S. ____, 58 L.Ed.2d 684 (1979). When as in Dallas, every child presently in the 12 grades in public school has been placed there under a racially-neutral assignment plan ordered by a federal court, there can be no "vestige" of a state-imposed dual school system. Certainly when there is no evidence or finding of any constitutional violation by the DISD after the 1965 decision and the undisturbed District court findings after two trials are to the contrary, there can be no basis or power for the lower federal courts to keep second-guessing themselves and repeatedly ordering a duly-elected public school board to "keep trying" with more student assignment plans. Under *Swann* and *Pasadena,* the plan adopted by the District Court should be vacated, and the case dismissed.

II. There Is No Basis In Fact Or Law For The Student Assignment (Busing) Orders Below

A. The Orders For Busing Of The District Court And The Fifth Circuit Are Constitutionally Defective, Since There Was No Finding That Any Present Racial Imbalance Resulted From A Constitutional Violation

By The DISD, To What Extent Any Such Violation Went, Or To What Extent Any Remedy Must Go Just To Cure Any Such Violation.

The U.S. District Courts in these cases are like U.S. District Courts in any other cases: They can only act on the basis of a constitutional or statutory violation. *Dayton*, 433 U.S. 410, 53 L.Ed.2d at 857; *Milliken v. Bradley*, 418 U.S. 717, 741-42, 41 L.Ed.2d 1069 (1974) (*"Milliken"*). Because of the vital role locally-elected and functioning school boards play in our nation's life, the power to displace that local board with supervening federal court orders in a school desegregation case can only be invoked after the case has been "satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton*, 433 U.S. at 410, 53 L.Ed.2d at 857.

After thousands of pages of testimony in the 1971 and 1976 hearings in Dallas, there has been no proof or finding of a new constitutional violation by the DISD in this case. The most that the District Court ever found was that there were racial imbalances among the schools caused principally by demographic factors (but not by the DISD), and that the DISD had created some "discrimination" by not *voluntarily* desegregating faculty and other staff, adopting a majority to minority transfer program, adopting some policy in regard to school construction and site selection, and appointing a *bi*-racial committee pursuant to the Fifth Circuit's *post-1965* decision in *Singleton v. Jackson Municipal Separate*

School District, 419 F.2d 1211 (1969). *Tasby-1971*, 342 F.Supp. at 948.

Curry at al have quoted at length the pertinent findings of the District Court in regard to "present" racial imbalances (which is, of course, a moving target due to neighborhood changes and the desire of the middle class to avoid busing). Not one of these rise to the level of a constitutional violation, and in fact the persistent themes in the 1971 and 1976 findings are (1) the DISD has tried hard and acted in good faith to give an equal educational opportunity to all students, and (2) "present" student body racial imbalances were caused entirely by demographic factors and orders of the courts themselves. The District Court and the Fifth Circuit have ordered more and more busing ("student assignment plans") solely because they mistakenly took one sentence in the *Swann* decision to require the immediate eradication of *all* racial imbalances in a school system.

If that narrow reading of *Swann* was excusable in 1975, it was totally inexcusable in 1978 — after this Court had written *Dayton*, which decision, if not already known, was called to the attention of the Fifth Circuit by Curry et al's "Supplemental Brief" on August 8, 1977. The Fifth Circuit in 1978 not only ignored the absence of any finding of a constitutional violation in this case, *it didn't even acknowledge Dayton or Austin II in connection with the DISD portion of this case.*

None of the three *Dayton*-required findings are anywhere in the record of this case nor is there

evidence to support any such findings. Indeed, as noted, the findings are directly to the contrary.

More specifically, there first and foremost is no finding that the alleged condition of racial imbalance "resulted from intentionally segregative actions on the part of the Board." *Dayton*, 433 U.S. at 433, 53 L.Ed.2d at 859. Instead, the unchallenged finding of the District Court in 1971 was that private housing patterns and no action of the DISD had caused the racial imbalance. This case is even devoid of the vague "cumulative violations" referred to in *Dayton*. The only specific findings of "discrimination" by the DISD consisted solely of its failure to adopt voluntarily (pursuant to post-1965 Fifth Circuit decisions) a majority to minority transfer policy and desegregation of its faculty, both of which actions were voluntarily taken prior to the end of the trial of this case in 1971. In any event, a "remedy" of busing is not even reasonably related to the cure required for such non-assignment non-acts. *Dayton*, 433 U.S. at 419, 53 L.Ed. at 863.

The second requirement of *Dayton* focuses on the results of the violation, if any. The trial court below and the Fifth Circuit did not even suggest that there was any incremental segregative effect on the racial distribution of the DISD school population as "presently" constituted, or even remotely suggest that the racial distribution of students is any different now than what it would have been in the absence of any such alleged "constitutional violation." Again, the District Court

findings are in fact to the contrary, that is that no act of the DISD caused the "present" racial imbalance in any of the schools.

The third *Dayton* requirement limits the fashioning of a remedy: "Once a constitutional violation is found a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation' ". 433 U.S. at 420, 53 L.2d at 863. "The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Ibid.* Applying this rule to the present case the District Court in 1971 adequately corrected any alleged constitutional deficiency by requiring the adoption of a majority-minority transfer policy, and the desegregation of faculty (each of which were voluntarily done by the DISD). However, the District Court and the Fifth Circuit also failed to do just what the Court of Appeals failed to do in *Dayton:* ". . . [I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." 433 U.S. at 417, 53 L.Ed.2d at 862. The District Court called for busing 17,300 students in grades 4-8 all over the 351 square miles of the DISD, except in the East Oak Cliff section; the Fifth Circuit remanded for more — all without any showing of the extent of the unfound but alleged student assignment violation.

Dayton, of course merely expanded this Court's prior ruling in *Austin Independent School District v. United States*,

429 U.S. 990, 50 L.Ed.2d 603 (1976) ("Austin *II*"), in which this Court pointed out to the Fifth Circuit that *Washington v. Davis*, 426 U.S. 229, 48 L.Ed.2d 597 (1976) controlled. *Washington v. Davis* held that mere racial imbalance was not enough to find a constitutional violation and that the essential of any constitutional violation requiring action was a finding of a purpose of intent to segregate in connection with an intentional discriminative act. The concurring opinion in *Austin II* predicted the principles of *Dayton* and expanded on what Chief Justice Burger had said in *Milliken v. Bradley*, 418 U.S. 717, 41 L.Ed.2d 1092 (1974), that the remedy [to correct a constitutional wrong] is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct *to the position they would have occupied in the absence of such conduct*. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L.Ed.2d 450 (1977), and *Board of School Comm'rs of the City of Indianapolis v. Buckley*, 429 U.S. 1068, 50 L.Ed.2d 786 (1977).

It is now apparent that the Fifth Circuit is continuing to refuse to follow *Dayton* and *Austin II*. As was pointed out in the dissent on December 5, 1978, in *Hutch v. U.S.; South Park Independent School District v. U.S.;* and *Board of Education for the City of Valdosta, Georgia v. U.S.*, ___ U.S. ___, 58 L.Ed.2d 684 (1978), this Court's rulings in school desegregation cases are being avoided by the Fifth Circuit by the simple expedient of continually sending cases back to the district court for additional remedial action — without pointing out

what action is to be taken or what constitutional violation requires it.

The Fifth Circuit in this case radically departed from the accepted and usual course of judicial proceedings and has required such a departure by a lower court. In the face of *Austin II*, the Fifth Circuit was requested by Curry et al to follow *Dayton*, and it didn't even cite it with respect to the DISD case. Then, after its opinion, the Fifth Circuit was requested by Curry et al in their Brief in Support of Rehearing en banc to follow Federal Rule Civ. Proc. 52(a) and to test the District Court findings by the "clearly erroneous" standard. Instead the Fifth Circuit ignored *all* District Court findings and remanded under the facade of *Swann* because there were not "adequate time-and-distance studies in the record." 572 F.2d at 1014. It is obvious that the Supreme Court must exercise its power of supervision. Rule 19-1(b), Rules of the Supreme Court. Since there are no *Dayton*-type findings that would authorize the exercise of federal court power to bus students, and since all findings are in fact to the contrary, the appropriate remedy is to reverse and render this case, returning the DISD to the authority of its School Board under the terms of the racially neutral plan adopted in 1965, with the already agreed to modifications by the School Board with respect to majority-minority transfers and faculty desegregation.

B. The "Remedy" Of Busing Adopted By The District Court And Ordered By The Fifth Circuit Is Inappropriate To Cure Even The Violations Alleged.

The District Court ordered imposition of a system-wide busing plan in 5 of 6 sub-districts of the DISD calling for 17,300 students in grades 4-8 to be moved just for the purpose of mixing ratios of black, brown and white bodies in the "middle" schools. It is improper — and actually a violation of the constitutional rights of others — to bus students just to attempt to eradicate predominantly white or predominantly black schools in the school system. *Dayton*, 433 U.S. at 417, 419-420, 53 L.Ed.2d at 861, 863-64.

As in *Dayton* and as in *Austin II*, "there is no evidence in the record available to us to suggest that, absent those constitutional violations [ed. note "if found"], the . . . school system would have been integrated to the extent contemplated by the plan." *Austin II*, 429 U.S. 990, 50 L.Ed.2d at 605 (concurring opinion). Since there have been two trials of this matter (1971 and 1976) and the explicit findings fail to support the plaintiffs' allegations, and indeed refute them, the District Court's student assignment plan is clearly unjustified under the principles of *Dayton*, *Austin II*, *Washington v. Davis*, and *Swann*.

The following facts and findings affirmatively preclude any busing order:

(1) Regarding the predominantly black South Oak Cliff sub-district, the District Court in 1971 found that in the Oak Cliff section of the District, the racial imbalance came from private housing patterns *after* 1965 (when the Fifth Circuit ordered a racially neutral plan) — and not from any DISD action. 342 F.Supp. 956. The Fifth Circuit never set those findings aside as "clearly erroneous" and hence they are binding today. Clearly no busing is justified in that area.

(2) The District Court in 1976 found that the South Oak Cliff area, "given the practicalities of time and distance, and the fact that the DISD is minority Anglo," must necessarily remain predominantly minority. The court also approved the conclusions of its appointed expert, Dr. Josiah Hall, that with few exceptions, that area's facilities were superior, the residential property located near each school was superior, and that educational opportunity in terms of facilities or programs would not be improved by complete redistribution of all pupils. 412 F.Supp. at 1204. The Fifth Circuit did not find that conclusion clearly erroneous.

(3) The trial court found many areas of the DISD that were *formerly* one race had become naturally integrated, namely Western Oak Cliff, Pleasant Grove, East Dallas, and the area of North Dallas included in the attend-

ance area for Thomas Jefferson High School. 412 F.Supp. at 1197. (These groups are in part before the Court as the Strom intervenors and the Brinegar intervenors.) The court found present student assignments should be maintained in those schools where integration had naturally occurred, because no "vestiges" remained. 412 F.Supp. at 1206. The Fifth Circuit did not hold those findings clearly erroneous.

(4) Curry et al provided testimony in 1971 that far North Dallas had been settled after Brown I. See 517 F.2d 108. There has never been any finding by any court that any action by the DISD had anything to do with the predominantly white residential settlement of that area, and hence the predominantly white schools that resulted from that settlement. Instead the District Court found in 1971:

> The adoption of a plan of desegregation for a school system of the size and complexity of DISD has been commented upon briefly. *The problems resulted, of course, from private housing patterns that have come into existence and not from any action of the DISD.* 342 F.Supp. at 951 (Emphasis added.)

The Fifth Circuit never set that finding aside as clearly erroneous, and hence it is binding today.

The result is inescapable: On the basis of findings and conclusions of the District Court in 1971 and 1976, no one of which has been set aside under Rule 52(a), there is no legal or constitutional basis for ordering busing in the DISD *in any area. Dayton.* Plaintiffs and the N.A.A.C.P. have had their days in court, they have not proven their allegations, and the findings on the present cause of racial imbalance in the DISD schools are against them. It is time this case ended, and the inappropriate student assignment plans adopted by the District Court and ordered by the Fifth Circuit be set aside.

III. "Busing" As A Remedy Is Not Practical Or Effective; It Has Never Been Proven An Appropriate Alternative To The Neighborhood School.

The Courts have now gone full circle. In *Brown v. Board of Education,* 347 U.S. 483, 98 L.Ed. 873 (1954) this Court held that legislatures, no matter how well intentioned, could not require school attendance on the basis of race. Congress in the Equal Educational Opportunity Act (20 U.S.C. §§1701, 1705, and 1712) also prohibited imposition of busing as a so-called remedial action to attain racial balances in schools. Yet precisely on the basis of race (*sub nom.* "racial imbalance" or "vestiges") and on their own judgment of what is best, federal courts have ordered busing to balance races.

It is amazing that the courts ever got into the busing ("student assignment," "transportation," "removal of

vestiges") business. Perhaps it is conceptually understandable that where school districts had long used buses to segregate, as in a tiny district like New Kent County,[1] or even in a larger, semi-urban district like Charlotte-Mecklenburg,[2] the courts logically, without any study or evidence of the impact of what they were doing, reversed the process and mundanely ordered the buses to be used to desegregate. That, however, even in semantic logic, is a canyon apart from permitting circuit courts, for some eight years now, without evidence, proof, or concern about the factual, educational, or sociological impact of busing orders, to disrupt every conceivable neighborhood school attendance zone and their historic neighborhood sociological impact on the structure of each affected community, against the unproven hope of bringing about more "desegregation" by balancing racial mixtures in large, urban districts. See, *e.g., Morgan v. Kerrigan,* 530 F.2d 401 (1st Cir. 1976). *United States v. Texas Educ. Agency,* 532 F.2d 380 (5th Cir. 1976); *Northcross v. Board of Educ. of the Memphis City Schools,* 466 F.2d 890, 894 (6th Cir. 1972).

Will this Court not now examine, at long last, what its order in *Swann* unleashed in terms of the effectiveness of busing (even assuming the legality of the "remedy"), in terms of educational benefit, and in terms of community impact in a democracy? If it does,

1 *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430, 20 L.Ed.2d 716 (1968).

2 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 L.Ed.2d 554 (1971).

it will find that busing, certainly in urban districts, has met none of its supposed goals — and no plaintiff in any desegregation case has to Curry et al's knowledge ever proven or offered to prove that it does. (Certainly plaintiffs and the NAACP in this case offered no such proof.)

The supposed rationale for imposing the remedy of mandatory busing to cure some default on the part of a local school board, must be (1) the desegregation of the system, or perhaps (2) the improvement of the quality of educational experience, or perhaps (3) the lessening of racial hostility, or perhaps (4) the increase of self-esteem among minority students.[3] There is no evidence, now eight years after *Swann*, that mandatory busing achieves any of the supposed goals. There is accordingly no justification for this Court to continue to hope, as it did in *Green* some 11 years ago, that busing "promises to work."

As a "remedy" to bring about desegregation (or racial balance in schools), mandatory busing has been a failure in large urban areas, especially those surrounded by predominantly white suburban school districts. Dr. David Armor, Senior Social Scientist at Rand Corporation,[4] did a special study of 16 school districts with

3 See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28-32, 28 L.Ed.2d 554, 575-77 (1971); N. St. John, School Desegregation—Outcomes for Children (Wiley & Son, 1975); L. A. Graglia, Disaster by Decree 105-132 (1976).

4 Dr. Armor's resume is Curry Ex. 5.

similar characteristics to Dallas that were (1) predominantly white at the time desegregation efforts commenced by the federal courts through the use of mandatory busing (2) in a large urban area (containing more than 20,000 students) and (3) surrounded by predominantly white suburbs. (Tr. VII: 221-26, 234-35) Dr. Armor testified that in his opinion the advent of mandatory busing in these 16 school districts resulted in a rapid loss of white enrollment and resegregation of the schools, leaving minority students with no opportunity for an integrated education. (Tr. VII: 235-50; see Curry Ex. 6-9 for a tabulation of his findings (at Appendix pages 260-264).) Dr. Armor visited Dallas schools, reviewed the Dallas busing plans proposed by plaintiffs, by the NAACP, by the DISD, Dr. Hall, and by The Dallas Alliance, and testified that all would cause resegregation in Dallas because of busing (Tr. VII: 250-58). Although experts produced by plaintiffs chipped-away at Dr. Armor's methodology, and although the District Court failed to make findings requested by Curry et al reflecting Dr. Armor's conclusions, he is clearly right — and the courts are displaying an ostrich-syndrome by refusing to recognize the obvious: The American parent who can avoid busing will do so.[5]

5 See opening statements in *Calhoun v. Cook*, 522 F.2d 717 (5th Cir., 1975) (recognizing the same disastrous result from court-tampering with racial balances in Atlanta even prior to busing); testimony of James S. Coleman in this record at Tr. 307-08; L. A. Graglia, Disaster by Decree, (1976); District Judge Taylor's findings in *Tasby-1976*, 412 F.Supp. at 1205; Dr. Armor's "Rand Paper," published following his work and testimony in Dallas, *infra* n. 16; Dr. Nathan Glazer's testimony, Tr. VIII: 276-77; Dr. Nolan Estes' (DISD Superintendent) testimony, Tr. I: 339-43, 352.

Professor James S. Coleman, Distinguished Professor of Sociology at the University of Chicago and the father of the massive "Coleman Report" on segregation in American Schools which is the basis of all sociological surveys in the field of race and education, testified that in his opinion, after studying the larger cities in the United States, "extensive desegregation" "increases the loss of white-children from the district and as a consequence, it has the longer-term effect of re-establishing predominantly black schools in the central city."[6] (Tr. VIII: 307-08) He testified that extensive desegregation in the DISD, based on his study and the effects of the 1971 order *(Tasby-1971)*, would have the long-term effect of resegregating the races. (Tr. VIII: 309) In Professor Coleman's opinion "complete elimination of racial segregation through racial balance in a large city's schools is neither a desirable nor a feasible goal, any more than complete balance among ethnic groups in each school is desirable or feasible." (Tr. VIII: 326)

Curry et al also brought Dr. John Letson, former Superintendent of the Atlanta school system during the time of its trials with court-ordered desegregation. Dr. Letson testified that in cities like Atlanta, where the remedy was merely threatened, the impact was a dramatic loss of white students. (Tr. VIII: 5-8) Dr. Let-

6 For some reason Professor Coleman's testimony is not indexed at the beginning of the transcript, but it appears in Volume VIII at pages 305-331.

son said in his opinion the adoption of a mandatory student assignment plan would not have brought about a successful desegregation effort in Atlanta but would only have accelerated resegregation. (Tr. VIII: 12-13) He said every effort, no matter how sincere, to move white children in and toward the inner city failed, and that in his opinion, similar efforts, as depicted in the various Dallas plans, would fail. (Tr. VIII: 19-20) Testifying as a "pragmatic school administrator" who had spent "a long period of years in honestly and honorably trying to accomplish this goal [of desegregation]," he said that he thought only voluntary plans, neighborhood schools, majority-to-minority transfers, and voluntary magnet schools would work. (Tr. VIII: 21-23) He was keenly disappointed at the failure of desegregation efforts in Atlanta, and condemned to failure the concept of desegregation, if that meant non-voluntary racial balancing by busing or otherwise. (Tr. VIII: 46, 48-49).

Further testifying at the request of *Curry et al* was Dr. O. Z. Stevens, Jr., Director of Research and Planning for the Memphis City School System. (Tr. VIII: 53) Dr. Stevens, through an elaborate, quite-thorough series of charts and tables (Curry Ex. 10, 11, and 12) detailed the utter destruction of any possibility of an integrated student body in Memphis due to post-Swann busing orders. (Tr. VIII: 55-110) Memphis, following such orders, lost 38,000 white students over and above what the research department had projected would be lost due to normal attrition, birth rate declines, and the like.

(Tr. VIII: 72) He testified that busing was not successful in desegregation at any level of public schooling (1 thru 12) and he did not think it would be successful in Dallas. (Tr. VIII: 107-110)

From this evidence, Dallas' own experience, and current sociological and educational studies, it is apparent that busing exacerbates, and does not aid, urban district segregation. Dr. Stevens testified that the result of the Memphis desegregation plan had been to create "the largest segregated school system in the South . . . called the Memphis Private and Parochial School System," consisting of 36,000 white and 1,000 black students. (Tr. VIII: 107)

The testimonies of Drs. Letson and Stevens detail the racial destruction of two fine school systems, and the obvious good faith attempts — and resulting agonies — of two dedicated school administrators who tried to prevent those results. Dr. William Webster, head of Research Evaluation and Information Systems at the DISD, and Dr. Nolan Estes, a distinguished educator and superintendent of DISD, agreed with the futility of busing to desegregate. Each of them cited the numerous studies which have been made in the field, all supporting the fact that as a remedy, court-ordered busing simply does not effectively achieve desegregation. (Webster, Tr. VIII: 160-61, 169-172; Estes, Tr. I: 336-37, VI: 337-353).

Mandatory busing also is a failure in terms of upgrading minority academic achievement, another supposed purpose of busing. The evidence is overwhelming that mandatory busing achieves no positive results in academic achievement. Nancy H. St. John, in her acclaimed book *School Desegregation—Outcomes for Children*, reviews one hundred and twenty studies and concluded no pattern of positive results emerged. Witnesses Armor, Webster, and Glazer agreed.[7] Even rebuttal witnesses agreed St. John's work was the latest and most thorough available. Dr. Lawrence Felice ran a specific study in Waco, Texas, on educational achievement and found that bused minority students significantly achieved less well.[8] The testimony of Dr. Armor, Dr. Estes, Dr. Coleman, and Dr. Nathan Glazer[9] distinguished Professor of Sociology and Education at Harvard University and co-editor of Public Interest, a widely-respected, scholarly national quarterly, is uniformly to the effect that *all studies demonstrate no positive results as a result of mandatory busing.*

Drs. Armor and Felice further testified that studies indicate either no improvement or in an increase in racial hostility and a lowering of minority student self-

7 Tr. VII: 261-64 (Armor); Tr. VIII: 170-71 (Webster); Tr. VIII: 271-73 (Glazer).

8 The study is Curry Ex. 18.

9 Tr. VII: 261-68 (Armor); Tr. I: 336-37 (Estes); Tr. VIII: 314-18 (Coleman), and Tr. VIII: 271-73 (Glazer).

esteem in those areas where mandatory busing was required by the United States courts.[10]

In summary, Curry et al brought to the trial substantial evidence that mandatory busing — in Dallas and across the nation — is not effective or practical to desegregate, to enhance racial relations, or to increase academic achievement for any race. The evidence now shows, and the nation's most distinguished scholars and sociologists agree, that actually, and particularly in large urban districts, notably Dallas and Memphis, busing to achieve racial balance, or the threat of it, causes massive losses of white students from the public school system — thereby causing resegregation, the recreation of minority isolated schools,[11] and the busing of minority students to predominantly minority schools. Petitioners Curry et al urge the Court to read in full the testimony of their witnesses, since their detailed charts, graphs, etc., obviously cannot be restated here. This evidence fully supported the trial court's decision not to bus grades K-3 and 9-12 (except by choice), but shows the order to bus grades 4-8 to be without support, unrealistic, ineffective, inequitable and totally inappropriate.

In Dallas the transition from a 69% Anglo school system to one in which Anglos constitute less than 35%

10 Tr. VII: 269-74 (Armor); Tr. VIII: 215-19 (Felice).

11 As defined in 20 U.S.C. §1619(10) (the Civil Rights Act of 1964, as amended 1972).

of the scholastic population with the loss of in excess of 50,000 students is a dramatic disaster. This is in a city that is not suffering from urban blight or stagnant economic decay but is experiencing vibrant growth in all areas, except its central public school system.

Against this background of failure as a desegregation tool, failure as an educational tool, failure as a tool to achieve racial harmony, and failure as a tool to increase the self-esteem of minority students — all of which is *in the record* perhaps for the first time this complete since the advent of post-*Swann* busing — the blind persistence of federal courts in ordering busing as a "remedy" defies human understanding (witness the large exodus of persons from the public school systems).

The Dallas experience in and of itself demonstrates the disaster to true desegregation caused by busing. It was indeed busing itself which created the predominantly black school at Carter High School, partially relieved by now reversing the student assignments, and which is now the subject of appeal by some of the parties to this action. As the District Court noted, it ordered 1,000 white students bused in 1971, of whom only 50 appeared to stay in the DISD. (412 F.Supp. at 1205).

The approach used by the federal courts after busing has been one of non-evidentiary hear-no-evil, see-no-evil. Since *Swann*, circuit courts have simply seized on

busing as a given remedy, have required no proof that it would accomplish any result, and have consistently either denied advocates of neighborhood schools the right to show its inappropriate or harmful effects[12] or have sanguinely brushed off the proof by refusing to enter the "battle of the sociological experts"[13] or have pontifically disdained findings that ". . . an order . . . will probably result in an all-black student body, where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited."

This Court in *Swann* started the large-scale busing business[15] merely by holding that it could be used as a "tool" to desegregate. It did so albeit there was *no proof in the record* of its effectiveness or its educational or sociological impact. However, the Court went to great lengths to re-emphasize its previously established requirements for any such equitable "remedy": (1) The remedy must promise to work and (2) it must be "judged by its effectiveness." (citing *Green, supra,* in both instances), *Swann, supra,* 402 U.S. at 20, 25; 28 L.Ed.2d at 569, 572. The Court in 1968 had in fact rejected a "free transfer" desegregation plan, because it felt the plan was not realistic since "it patently operates as a device

12 *Morgan v. Kerrigan,* 530 F.2d 401, 419-22 (1st Cir. 1976).

13 *Tasby-1976,* 412 F.Supp. n. 50 at 1205.

14 *Lee v. Macon County Board of Education,* 465 F.2d 369, 370 (5th Cir. 1972).

15 It has undoubtedly produced "wind-fall profits" to bus makers and gasoline suppliers. See DISD Ex. 21 for the $11,600,000+ projected cost of implementing the NAACP's plan to bus 40,000 students.

to allow *resegregation* of the races. . . ." *Monroe v. Board of Comm'r of the City of Jackson*, 391 U.S. 450, 459, 20 L.Ed.2d 733, 739 (1968). Curiously, the Court has not yet applied the "resegregation" test to busing, for if it did, busing as a remedy would be immediately rejected.

If the Court is consistent, and if it views urban-district busing against the time-honored equitable concepts of mercy, practicality, effectiveness, promise of reality, and the necessary balancing of the effects of busing on any of the segments of society it touches, *e.g.*, the neighborhood schools, as they exist, the city politic, the parents and their children who (a) are non-agreeable busing subjects or (b) are agreeable busing subjects, and the school district itself, it will find, certainly in this record, no evidence or promise of success. Although it was not their burden, and although the District Court did not make their requested findings, Curry et al's evidence in this record, from distinguished educators and sociologists around the country and from Dallas' own sad experience, shows that busing is inequitable — a failure.[16] There was no

16 Current sociological and educational literature supports Curry's positions. This was the testimony of Dr. Nathan Glazer, distinguished Professor of Education and Sociology of Harvard University, in this case. Tr. VIII: 271-73, 289. See also D. Armor, White Flight, Demographic Transition, and The Future of School Desegregation, Rand Paper No. P-5931 (Aug. 1978) (delivered to American Sociological Ass'n, San Francisco, September 1978); L. A. Graglia, Disaster by Decree (1978); Beyond Busing—Some Constructive Alternatives, (various monographs) (Amer. Educ. Legal Defense Fund, 1976); N. St. John, School Desegregation—Outcomes for Children (1975).

evidence — and no finding — to the contrary, to justify the busing ordered by the District Court.

This Court must face the harsh reality that if indeed public school systems of the United States are to be preserved federal courts must reverse the resegregated urban school districts they have created.

Dr. Nolan Estes testified neighborhood schools have been effective educational tools.[17] But more important in a period where the central cities are desperately fighting for survival and renewal, neighborhoods and a sense of neighborhood are essential to rejuvenation. The central focus of any neighborhood is its school, as it is only there where significant numbers of parents meet and work to preserve a vital ingredient of our republic.

Perhaps the real issue before the Court is whether school districts may adopt a racially neutral neighborhood school pattern of student assignment, with the escape hatch of majority to minority transfer options and magnet schools; or whether the neighborhood school concept, even with the escapes and safeguards of majority-minority transfers and

17 Tr. I: 344-45. The testimony was:

Q (Mr. Blumenthal): All right. And I believe you further testified that finally our evidence indicates that students can learn and probably learn better regardless of race in neighborhood type schools?

A (Dr. Estes): We can document that with our extensive and elaborate systematic research and development program.

magnet schools, is unconstitutional because of the familiar housing patterns of American cities. Not only have school boards and citizens throughout the United States historically considered neighborhood schools important, but Congress in the Equal Educational Opportunity Act itself expressed a national view that such arrangement of student assignment is important. The fact that this nation has historically organized itself into ethnic neighborhoods is a familiar pattern. No one suggests that the "Jewish" schools of the lower east side of New York, the "Irish" schools of south Boston, the "Italian" schools in east Boston, and "Polish" schools in south Chicago are "inferior" because of their ethnicity or "segregated" because of their neighborhood concept. If the Court determines that black neighborhood schools are unconstitutional as the Fifth Circuit continually does under the indicting jargon of "one race schools," surely it should also determine that all other ethnic neighborhood schools are "one race" and unconstitutional.

The sole basis for the "desegregation" cases is that black schools were once mandated by state statute in some states prior to 1954. A generation has passed since that time, and measured in terms of a school system, two generations of 12-year students have come and gone. The Constitution has limits on "corruption of blood" even for those convicted of treason. Article III, Section 3; Bills of Attainder are prohibited both to Congress, Article I, Section 9, and the States, Article I, Section 10. Surely the Courts are similarly limited in the tainting of generations, of public school students.

How many future generations are to be deprived of the privilege of going to a neighborhood school and of equal protection of the laws because their state legislatures once imposed a legal requirement of segregation upon their ancestors' school systems? Petitioners cannot be more eloquent than was Mr. Justice Powell in his defense of the neighborhood school system and the need for parents' concern and nurturing protection of their children expressed in the concurring opinion in *Keyes v. School District No. 1*, 413 U.S. 189, 245-251, 37 L.Ed.2d 548, 584-587 (1973). Justice Powell there also foresaw the divisive spector looming behind the issue of busing:

> Finally, courts in requiring so far-reaching a remedy as student transportation solely to maximize integration, risk setting in motion unpredictable and unmanageable social consequences. No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races, or guess how much impetus such dismantlement gives the movement from inner city to suburb, and the further geographical separation of the races. Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools, or divert attention from the paramount goal of quality in education to a perennially divisive

debate over who is to be transported where. (413 U.S. at 250, 37 L.Ed.2d at 587)

The answer to the question is in. All of the "unpredictable and unmanageable social consequences" are now predictable and at *least* as destructive as feared. No Court has ever seen nor required evidence to show that the remedy of busing will in fact desegregate, and will not in fact resegregate and destroy familiar neighborhood ties — if not the ties that once brought young, middle class Americans to our cities. The *best* that can be said for all the sociological and educational evidence ever advanced in support of busing is that it is inconclusive and by no means supports such a conscriptive, disruptive interference of federal courts into the private lives of millions of Americans.

The truth is, however, the busing diehards, and the Courts, simply will not open their eyes to the obvious. Mandatory busing to achieve "desegregation" is a failure, since it resegregates, it advances or promotes no significant social or educational goal, and it has run thousands of middle-class Americans out of the public school system and into private schools or suburbs. From leading intellectuals,[18] pragmatic secondary school educators,[19] and social scientists-educators,[20]

18 Nathan Glazer, Tr. VIII: 271-273.

19 John Letson (Atlanta), Tr. VIII: 5-20, 46-49; O. Z. Stevens (Memphis), Tr. VIII: 55-110; Nolan Estes (Dallas), Tr. I: 336-44.

20 David Armor (Rand Corporation), Tr. VII: 221-58; James S. Coleman (University of Chicago), Tr. VIII: 307-26; Lawrence Felice (Baylor University), Tr. VIII: 207-21.

the Court is being told its "tool" of equity is a bitter failure.

Probably Dr. Felice's surprise at the negative results of his study in Waco and his warning to minority families best capsulizes the busing dilemma:

> First of all I was surprised by this. I didn't expect to find it and I don't think I really wanted to find it. (Tr. VIII: 219)
>
> It seems to me I would really be fearful of using mandatory busing in a community where there wasn't a majority of the white community and black community in favor of it. It seems to me if the community, if everyone was in favor of it it would work. But on the other hand what I tend to conclude from the data that I have is that people were not in favor of this in Waco and it created problems. And . . . well I guess a part of my being here or a part of the reason I am here too is to try and just to publish the results of this study and even to suggest to minority families that the results may not be necessarily beneficial. (Tr. VIII: 220-21)

The attitude — and lack of success — in Waco is no different than in Atlanta, Boston, Dallas, Detroit, and the other major cities where the "promise" or "hope" of busing working and working *now*, has been dashed.

If this Court desires to create a system of private schools for the affluent, the rich and the suburban, and leave inner city schools predominantly minority and poor, it is free to do so. But this Court should be mindful of what it is doing and why. Public School has been the common experience of most all Americans. It has been a social leveler, and the escape hatch for the upwardly mobile. When each student has an opportunity to go to any school in which he is in a minority by race and there are non-discriminatory neighborhood assignments otherwise, there is available all of the constitutional requirements for an equal education opportunity school system. That is all the Constitution requires. Busing takes the Court and the notion of equal educational opportunity into another realm — one not contemplated by the U.S. Constitution.

CONCLUSION

In 1965 the Fifth Circuit Court of Appeals mandated a racially neutral neighborhood school student assignment plan for the DISD. The district operated under this plan for five years in accordance with the mandates of the court; the courts now have no standing to revise that plan to remedy racial imbalances that were not caused by any intentional segregative act of the DISD. Further, there is no showing of any intentional segregative action by the DISD which caused the racial imbalances sought to be remedied. Finally, there has never been a finding that the student assignment plan in Dallas or similar plans anywhere in fact

"desegregate" and the overwhelming evidence is that such plans resegregate the districts in which they were adopted, without any benefits. The hour is late for the Dallas Independent School District and for public school systems across the nation. The Court has unleashed forces which are changing the very nature of central cities of America, effectively removing the middle class from such cities and their school systems. In eight short years the Dallas Independent School District has gone from 69% Anglo to less than 35% Anglo. This is a demographic shift of colossal proportions.

Neighborhoods and cities cannot survive without the amenity of a viable and supported public school system. A racially neutral neighborhood school system does not violate the Constitution of the United States. This is especially true when the additional safeguard of a majority-to-minority transfer policy is assured, so that every student may attend, if the student chooses, any school in which his race is a minority. This Court should finally address the issue of racially neutral neighborhood schools, unclothed by the rhetoric of "vestiges" and unprejudiced by a belief that a school district is "segregating" because free people voluntarily select housing and the neighborhood in which they choose to live.

Respectfully submitted,

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Dated:

PROOF OF SERVICE

We, Robert L. Blumenthal and Robert H. Mow, Jr., attorneys for Petitioners Curry et al. herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1979, we served three copies of the foregoing Brief upon the following Counsel for Respondents, Counsel for other Petitioners, Counsel for Amicus Curiae, and the Respondent Pro Se:

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by mailing same to such Counsel and Respondent pro se at their respective addresses and depositing the same in a United States mail box in an envelope properly addressed to such addresses with first class postage prepaid.

We further certify that all parties required to be served have been served.

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